

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 4, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2006AP566**

Cir. Ct. No. 2005TR4791

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN THE MATTER OF THE REFUSAL OF GAYLORD W. SPAULDING:**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**GAYLORD W. SPAULDING,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Manitowoc County:  
JEROME L. FOX, Judge. *Affirmed.*

¶1 SNYDER, P.J.<sup>1</sup> Gaylord W. Spaulding appeals from an order revoking his operating privilege for a period of one year due to his refusal to submit to an evidentiary chemical test. Spaulding argues that the arresting officer had no probable cause to administer a preliminary breath test and no probable cause to arrest. We observe that the State's burden at a refusal hearing is less than that at a suppression hearing and we hold that the State has demonstrated probable cause to believe that Spaulding was operating a vehicle while he was intoxicated. Consequently, we affirm the order of the circuit court.

### BACKGROUND

¶2 On December 4, 2005, law enforcement officers were dispatched to a vehicle in a ditch. A witness had called in to report a reckless driver. Manitowoc County Deputy Sheriff Dan Hartwig arrived on the scene and identified the driver of the car in the ditch as Spaulding. Hartwig also spotted a vehicle that was nearby and determined that the driver of that vehicle had been the one to call in the original report. Hartwig gave the witness a "written statement form," which the witness completed at the scene and returned to Hartwig.

¶3 Hartwig checked on Spaulding to see if he was injured and, in the course of their exchange, Hartwig noticed that Spaulding's speech was very slurred and his eyes were watery and bloodshot. Hartwig also noticed that Spaulding's movements were slow and methodical and that there was an odor of intoxicants on him.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise indicated.

¶4 Hartwig's shift was about to end, so he turned over the investigation to Deputy Todd Cummings. Hartwig gave Spaulding's Illinois drivers license and the witness statement to Cummings. Hartwig also told Cummings that, based on his observations, he believed Spaulding was too impaired to drive. As he investigated the general area, Cummings observed fresh tire marks near a traffic sign pole that had been knocked over, as well as marks showing that the vehicle went back onto the highway. Cummings testified that the vehicle then traveled along the highway and eventually into the ditch. He also noticed the odor of alcohol and spoke with Spaulding, who admitted having consumed "a few" alcoholic beverages earlier in the evening. Cummings then walked away from Spaulding because first responders and ambulance personnel were trying to assess Spaulding's medical condition.

¶5 Spaulding was transported by ambulance to Holy Family Memorial Hospital for additional medical treatment. While at the hospital, Spaulding consented to a preliminary breath test (PBT). The results of the PBT are not a matter of record. Ultimately, Spaulding was issued a citation for operating a motor vehicle while intoxicated. Spaulding then refused to submit to an evidentiary chemical test, contrary to WIS. STAT. § 343.305(3), and was issued a notice of intent to revoke his license. Spaulding requested a refusal hearing, which took place in February 2006. Following the hearing, the circuit court revoked Spaulding's driving privileges for one year. Spaulding appeals.

## **DISCUSSION**

¶6 At a refusal hearing, the issues are limited to whether the officer had probable cause to believe the defendant operated a motor vehicle while intoxicated, whether the officer properly informed the defendant under the implied

consent law, and whether the defendant improperly refused the test. WIS. STAT. § 343.305(9)(a)5. Spaulding's only contested issue here is probable cause. We review probable cause under a de novo standard of review. *County of Jefferson v. Renz*, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999).

¶7 Spaulding contends that without performing field sobriety tests or citing other indicators of intoxication, the deputies had no probable cause to administer the PBT and, absent the PBT, they had no probable cause to arrest. However, the test of probable cause under the refusal hearing statute, while greater than the reasonable suspicion necessary to justify an investigative stop, is less than the level of proof required to establish probable cause for arrest. *Id.* at 314; *State v. Wille*, 185 Wis. 2d 673, 681, 518 N.W.2d 325 (Ct. App. 1994) (“The State’s burden of persuasion at a refusal hearing is substantially less than at a suppression hearing.”). Because this was a refusal hearing, we look only to see if the State established that the arresting officers had probable cause to believe that Spaulding was operating a motor vehicle while under the influence of an intoxicant. *See State v. Nordness*, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986). The evidentiary scope of the refusal hearing is a narrow one, and the court must simply ascertain the plausibility of the arresting officer’s account. *Id.* at 35-36.

¶8 Spaulding’s primary argument is that Cummings should have performed field sobriety tests to ascertain whether the PBT was warranted. He asserts that, even though he was transported by ambulance to the hospital and was receiving medical treatment there, Cummings still could have asked Spaulding to perform the “reciting the alphabet, counting backwards and finger dexterity [field sobriety] tests.” Nonetheless, the question of probable cause is properly assessed on a case-by-case basis. *See State v. Kasian*, 207 Wis. 2d 611, 622, 558 N.W.2d

687 (Ct. App. 1996). In some cases, the field sobriety tests may be necessary to establish probable cause; in other cases, they may not. *Id.*

¶9 Here, a witness called in a report of an erratic driver and directed authorities to the scene. Hartwig arrived and spotted the vehicle in the ditch. He noticed Spaulding's slurred speech, watery and bloodshot eyes, and an odor of intoxicants. Cummings joined Hartwig at the scene and also noticed an odor of intoxicants in Spaulding's vehicle. Hartwig told Cummings what he had observed and gave Cummings the witness statement. Cummings asked Spaulding whether he had been drinking. Spaulding responded that he had had "a few" alcoholic beverages that evening. Cummings also investigated the area leading up to the ditch where fresh tire marks indicated an erratic path of travel by the vehicle in the ditch. We are satisfied that the arresting officers had probable cause to believe that Spaulding was operating a motor vehicle while under the influence of an intoxicant. *See Nordness*, 128 Wis. 2d at 35.

¶10 We need not address Spaulding's arguments regarding probable cause to arrest. He asserts that the State did not meet its burden to demonstrate probable cause to arrest because it did not offer the witness statement at the refusal hearing for the truth of the matter asserted and further that the State never introduced the results of the PBT test. These arguments are premature. The test of probable cause under the refusal hearing statute is less than the level of proof required to establish probable cause for arrest. *Renz*, 231 Wis. 2d at 314. The State has met its burden under WIS. STAT. § 343.305(9)(a)5.

## CONCLUSION

¶11 We conclude that the officers' account of the circumstances and scene of the accident and of Spaulding's condition, the odor of intoxicants, and

Spaulding's admission of having had alcoholic beverages earlier in the evening established probable cause to believe Spaulding had been operating under the influence. Under WIS. STAT. § 343.305(9)(a)5., this is all that is required. Accordingly, we affirm the order of the circuit court.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

